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THE WOLF FIRM, A Law Corporation, erroneously
sued herein as THE WOLF LAW FIRM, A Law Corporation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VICTORIA A. AMELINA, an individual;
and A.A.;D.S.; and B.S., each individuals
and minors by and through their Guardian
Ad Litem, Victoria A. Amelina,

Plaintiffs.

vs.

MANUFACTURERS and TRADERS
TRUST COMPANY aka M&T BANK,
SAFEGUARD PROPERTIES, LC and
THE WOLF LAW FIRM, A Law
Corporation,

Defendants.

Case No.: 3:14-CV1906-WQH-NLS

Assigned for all Purposes to:
The Honorable William Q. Hayes

**OPPOSITION OF DEFENDANT THE WOLF
FIRM TO PLAINTIFFS' MOTION FOR
LEAVE TO AMEND AND FILE THIRD
AMENDED COMPLAINT**

DATE: January 19, 2016
TIME: N/A
DEPT: N/A

NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT

Complaint Filed : August 13, 2014
Trial Date : None Set

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

This lawsuit arises from facts related to plaintiff VICTORIA AMELINA (“plaintiff”) and her ownership of residential real property located in San Diego, California (the “Property”). After defaulting on her loan, non-judicial foreclosure proceedings were initiated by the substitute trustee, defendant THE WOLF FIRM, A Law Corporation, erroneously sued herein as THE WOLF LAW FIRM, A Law Corporation (“Wolf”). Plaintiff alleges that Wolf’s conduct violated the Fair Debt Collection Practices Act (“FDCPA”). Although plaintiff has added additional facts to each of her successive amended complaints in an effort to sufficiently allege facts against defendant Wolf to assert a claim for violation of the FDCPA, the law remains clear that in the Ninth Circuit, non-judicial foreclosure activities are not considered debt collection within the scope of the FDCPA – and, even if they were, plaintiff has still not sufficiently alleged that Wolf was a “debt collector” as defined by the FDCPA. Plaintiff has had her proverbial “three bites at the apple”, to no avail. She should not be entitled to a fourth “bite”, especially as the proposed Third Amended Complaint does not add any new facts that suggest that Wolf acted beyond its scope as foreclosure trustee. For that reason, plaintiff’s motion for leave should be denied.

1 **2. WHILE LEAVE TO AMEND IS WITHIN THE DISCRETION OF THE**
 2 **COURT, LEAVE SHOULD BE DENIED WHEN FURTHER**
 3 **AMENDMENT IS FUTILE.**

4 Fed. R. Civ. P. 15(a)(2) provides that “a party may amend its
 5 pleading only with the opposing party’s written consent or the court’s
 6 leave. The court should freely give leave when justice so requires.” As
 7 the U.S. Supreme Court stated, “if the underlying facts or circumstances
 8 relied upon by a plaintiff may be a proper subject of relief, he ought to be
 9 afforded an opportunity to test his claim on the merits.” *Foman v. Davis*,
 10 371 US 178, 182 (1962). The *Foman* court thereafter suggested certain
 11 factors that could provide a court with reason to deny leave: (1) undue
 12 delay; (2) bad faith or dilatory motive on the part of the movant; (3)
 13 repeated failure to cure deficiencies by amendments previously allowed;
 14 (4) undue prejudice to the opposing party; and (5) futility of amendment.
 15 *Id.*; *Carvalho v. Equifax Info Servs., LLC*, 629 F.3d 876, 892-893 (9th Cir.
 16 2010).

17 The foregoing “*Foman* factors” are especially relevant in the
 18 instant case, and in particular, the point that any further leave would be
 19 futile. *Leadsinger v. BMG Music Pub*, 512 F.3d 522, 532 (9th Cir. 2008).

20 In the instant matter, plaintiff’s clear dilemma is that non-judicial
 21 foreclosure activity is not covered within the parameters of the FDCPA in
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1 the jurisdiction covered by the Ninth Circuit. *Hulse v. Ocwen Federal*
2 *Bank, FSB*, 195 F.Supp.2d 1188, 1204 (D. Ore 2002); *Izenberg v. ETS*
3 *Services, LLC*, 589 F.Supp.2d 1193, 1199 (C.D. Cal. 2008); *Makreas v.*
4 *First Nat'l. Bank of Northern California*, 856 F.Supp.2d 1097, 1101 (N.D.
5 Cal. 2012).

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8 As to Wolf, plaintiff concedes that Wolf only communicated with
9 plaintiff upon being substituted in as the foreclosure trustee on or about
10 April 28, 2014. Thereafter, all communications with Wolf pertained to
11 Wolf's statutory notice requirements. The proposed Third Amended
12 Complaint (proposed "TAC") [MFL, Exhibit "A"] and Exhibit 7 confirm that
13 the April 28, 2014 "letter" was a Notice that foreclosure activity had
14 begun at the direction of M&T Bank, that there was a default, and
15 provided both the amount in default and the outstanding balance, among
16 other notices. Nowhere within that first letter was there a provision that
17 plaintiff "pay back the money or else foreclosure activity would proceed."
18 [SAC, ¶¶113, 118.] Indeed, the letter was accompanied by the Notice of
19 Default. Thus, foreclosure activity had begun. [MFL Ex 7.]

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24 Plaintiff previously alleged that Wolf was attempting to collect a
25 debt, and communicated with plaintiff in an effort to harass and
26 intimidate plaintiff. [SAC, ¶¶114, 120.] However, while the April 28th
27 letter is entitled, "Notice Under Fair Debt Collection Practices Act" and
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1 further includes a disclaimer that Wolf “is acting as a debt collector and
2 attempting to collect a debt,” these provisions on the letter are simply
3 disclaimers used in caution. Such language on a law firm’s letterhead
4 “without more, [does] not transform the firm into a debt collector for all
5 purposes ... [and] is insufficient to raise a triable issue of fact on the
6 question of the firm’s status as a debt collector.” *Golliday v. Chase*
7 *Home Fin., LLC*, 761 F.Supp.2d 629, 636 (W.D. Mich. 2011).

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9 In a recent decision very similar to the instant case, *Cochran v.*
10 *The Bank of New York Mellon Trust Company, NA*, No. CV 15-3209-
11 GHK (JCx) (C.D. Cal. July 29, 2015), the court specifically addressed
12 the “debt validation” letters often included with or around the time of the
13 notice of default, and held that such letters (so-called “dunning” letters)
14 were part of non-judicial foreclosure activities.

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16 Moreover, plaintiff concedes in her proposed TAC that Wolf’s
17 principal business purpose is expansive. Plaintiff’s proposed TAC
18 alleges that “for over twenty-five years, [Wolf has] regularly ‘provided a
19 broad array of legal and related services throughout California and
20 nationally to lenders, servicers, investors, governmental agencies and
21 other members of the financial services community’ through ‘cradle-to-
22 grave services’ that include Collection, Replevin/Claim and Delivery,’ ...”
23 [MFL Ex “A”, ¶43.] However, “debt collection that is only ‘some part’ of a
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1 defendant's business is insufficient to state a claim under the FDCPA."
2 *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204, 1209 (9th Cir. 2013).
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4 In short, plaintiff's proposed allegations concede that debt collection is
5 not the principal purpose of Wolf; rather, it has a broad array of services,
6 including collection.

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8 This is plaintiff's fourth opportunity to allege facts that Wolf's
9 conduct went beyond its foreclosure-related obligations, and, once
10 again, her efforts have failed. Further amendment, therefore, is clearly
11 futile.

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13 As such, plaintiff's motion seeking leave to amend should be
14 denied.

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16 **3. CONCLUSION**

17 Plaintiff has now had three attempts to allege facts sufficient to
18 state a cause of action against Wolf for violating the FDCPA. Plaintiff's
19 proposed fourth attempt clearly alleges that Wolf neither is a debt
20 collector as defined by the FDCPA nor conducted itself in a manner that
21 exceeded the scope of its statutorily mandated foreclosure activities.
22 Further leave would, thus, be futile.

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1 For the foregoing reasons, plaintiff's motion for leave to amend
2 and file a Third Amended Complaint should be denied.
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4 Date: December 30, 2015

THE WOLF FIRM, A LAW
CORPORATION

By: /s/ Abe G. Salen
Abe G. Salen

Attorneys for Defendant
THE WOLF FIRM, A Law
Corporation, erroneously sued herein
as THE WOLF LAW FIRM, A Law
Corporation

CERTIFICATE OF SERVICE

I am over the age of eighteen years and not a party to nor interested in the within action. My business address is 2955 Main Street, Second Floor, Irvine, California 92614.

A true and correct copy of the foregoing document(s), entitled:

OPPOSITION OF DEFENDANT THE WOLF FIRM TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND AND FILE THIRD AMENDED COMPLAINT

will be served or was served (a) on the judge in chambers in the form and manner required by Local Rule ("LR") 5.4.

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders, the foregoing documents will be served by the Court via NEF and hyperlink to the document. On December 30, 2015, I checked the CM/ECF docket for this matter and determined that the following persons on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated on the attached service list.
2. **SERVED BY UNITED STATES MAIL:** On December 30, 2015, I served the following persons and/or entities at the last known address in this case by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid and addressed as follows.
3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state the method for each person or entity served): Pursuant to F.R.Civ. P. 5 and/or controlling local rules, , I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the Judge here constitutes a declaration that personal service on overnight mail to, the judge will be completed no late than by 12:00 p.m. (Noon) the following business day. Service information continued on attached service list.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on December 30, 2015, at Irvine, CA.

/s/ Jess Ramos

Jess Ramos

SERVICE LIST

VICTORIA A. AMELINA, et al. vs. MANUFACTURERS and
TRADERS TRUST COMPANY, et al.

Case No. 14CV1906-WQH-NLS

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IV. SERVED VIA U.S. MAIL

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United States District Court Southern District

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